No. 94-1610

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ASTON A. BEADLE,

Petitioner,

v.

HILLSBOROUGH COUNTY SHERIFF'S OFFICE,
A/K/A/ HILLSBOROUGH COUNTY SHERIFF'S DEPARTMENT,
AND WALTER C. HEINRICH, AS SHERIFF
OF HILLSBOROUGH COUNTY, FLORIDA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY BRIEF OF PETITIONER

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Petitioner asks this Court to instruct whether Title VII requires an employer, absent a collective bargaining agreement's constraints, to do more than woodenly apply neutral work rules when to do so unevenly burdens Sabbatarians, requiring them to choose between their religion or their job. The Sheriff asserts that this Court held "in [*Trans World Airlines, Inc. v.] Hardison,* [432 U.S. 63 (1977),] a neutral rotating shift system is a reasonable accommodation per se." Opp. at 25.[1]

The Sheriff challenges Beadle's claim that a reasonable accommodation must eliminate the conflict between the employee's religious practices and his work requirements. Opp. at 25-28. May an employer offer a neutral rotating shift as an accommodation even if it causes the work conflict? May an employer define accommodation as job swaps for both religious and secular purposes when such swaps prove to be unworkable? Does *Hardison* say an employer need not affirmatively search for a workable accommodation if it simply adheres to its neutral work rules?

1. The Sheriff claims there is no conflict among the circuits over whether a neutral rotating shift system is a reasonable accommodation *per se*. But this argument is beside the point because Beadle's claim is broader. The Eleventh Circuit's holding that an employer satisfies Title VII's accommodation duty by merely adhering to neutral work rules (Pet. App. at 8a) is in conflict with at least two other circuits: *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987), and *EEOC v.*

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[1]At the trial the Sheriff's counsel likewise argued that "under *Hardison*, the fact that we had a neutral rotating shift system as a matter of law is a significant accommodation to Beadle. Therefore, the statutory inquiry is at an end." R6-13:4-8. He added, "once we allowed the swap, that it didn't work is of no consequence." R6-24:17-21.

Ithaca Industries, Inc., 849 F.2d 116 (4th Cir. 1988).

Ithaca Industries, 829 F.2d 519 (1987), before reversing itself *en banc*, like the Eleventh Circuit here, held that, in following its neutral scheduling system, the employer had fulfilled its duty to reasonably accommodate. As noted by one commentator:

> Thus, as Ithaca Industries did not offer Dean a method of accommodation that resolved his conflict, it should have been required, pursuant to *Ansonia*, to prove that other no-cost alternatives would have created an undue hardship. Instead, by refusing to evaluate no-cost methods of accommodation even after the employer did not offer to accommodate the employee, the Fourth Circuit panel, in effect, required neither reasonable accommodation *nor* a showing of undue hardship. . . .
>
> A majority of the Fourth Circuit recognized these problems, and the case was subsequently reversed by the court sitting en banc. . . . Beyond this, *Ithaca Industries*, like *Pyro Mining* and *Hardison*, goes beyond *Ansonia* in clearly refusing to allow employers to satisfy their duty to accommodate simply by adhering to a neutral work rule.

Peter Zablotsky, *After the Fall: The Employer's Duty to Accommodate Employee Religious Practices Under Title VII After* Ansonia Board of Education v. Philbrook, 50 U. Pitt. L. Rev. 513, 571-72 (1989).

In *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 153 (1983), this Court found a conflict involving a question of interpretative methodology also provides a proper basis for

review.

2. The Sheriff concedes Beadle swapped days off with his coworkers. Opp. at 20. Yet the Sheriff's opposition is particularly striking for what it does not dispute, to wit:

(a) Uncontradicted testimony confirmed other deputies were unwilling to swap shifts with Beadle, Pet. at 18;[2]

(b) When job swaps and the use of comp time did not work to solve his religious needs, Beadle requested a transfer to a bailiff position, Pet. at 5;[3]

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[2]Because it is uncontradicted that deputies were unwilling to voluntarily trade with Beadle, the Sheriff can't rely on Major Cook's instructions to Beadle's supervisors that he be allowed to trade days off, Opp. at 5; or to suggest that Beadle had authority to use the Department's bulletin board, employee roster sheets, or to advertise his need during roll call. Opp. at 10. Communication with Beadle's coworkers was not the problem. The problem, as Lieutenant Deaton testified, was that Beadle was unable to find anyone willing to swap and the Department would no longer permit Beadle to use comp time. R6-172:21-173:14. The Sheriff insinuates Beadle never spoke with Colonel Parrish about difficulties finding someone with whom to swap. Opp. at 6. But Parrish had told Beadle Captain Cook would be handling his Sabbath scheduling problems. R5-68:23-69:14; 151:5-23. Hence, Beadle reported to Cook about his swap attempts. Cook testified that though Beadle often asked for help, swapping was difficult. R6-53:17-54:8.

[3]The Sheriff argues there was no guarantee Beadle would get such a transfer in the future. Opp. at 7. However, Captain Cook testified vacancies did occur fairly regularly. Cook Dep. at 22:2-24:20. Also, although the Sheriff argues that even if Beadle had been transferred the problem would not have been solved because bailiffs *sometimes* were called upon to work on Friday nights and Saturdays, Opp. at 7-8, Deaton testified the bailiff's position would have been a perfect accommodation because bailiffs normally did not work weekends. R6-162:2-166:3. The simple fact is the Department did not consider transferring Beadle to the bailiff's

(c) The Sheriff had the authority, prior to Beadle's completion of probation, to transfer him to a bailiff's position, Pet. at 5;

(d) Although it would not have caused a safety problem to transfer Beadle prior to completion of his probation, the Sheriff refused offering only neutral rotating shift and job swaps, Pet. at 6;

(e) The Sheriff did exempt from the scheduling arrangement employees attending school but refused to permit such an accommodation for Beadle because that would have been contrary to guidance from legal counsel, Pet. at 6;

(f) When Beadle was fired, his immediate supervisor had just transferred him to a shift that would have allowed him to complete his probation without having to work on his Sabbath, thus facilitating a post-probation transfer to a position not requiring weekend work. Such an arrangement cost the Department nothing and was actually beneficial since it equalized the squads and did not displace any coworker, Pet. at 7; and

(g) The Sheriff asked Beadle to choose between working on his Sabbath and not being terminated or refusing to compromise his religious beliefs and being fired. Pet at 7.[4]

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position; failed to explore whether any other deputies were even seeking such a transfer; and did not look for other available positions not requiring weekend work. Heinrich Dep. at 48:17-52:15; 55:19-56:16.

[4]The fact that Beadle was given a choice between working on his Sabbath or not working his Sabbath and being fired proves his firing was not disciplinary. Beadle's supervisor was accommodating him when he was fired. If upper management had been willing to do the same for the short time until his probation was completed, several accommodation

3. The Sheriff holds tenaciously to the belief it need do nothing beyond pointing to its work rules. Such rigid and unhelpful conduct by a government official is contrary to the Ninth Circuit's *Hardison* interpretation. In *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989), the employer relied on "the proposition that, like TWA, it was bound by its union contract to schedule employees on the basis of seniority and cannot, therefore, be held liable." *Id.* at 1513. The Ninth Circuit disagreed:

> Appellant's reliance on *TWA* is misplaced. The Court in *TWA* addressed the degree of accommodation that was required of an employer within the framework of a seniority system. The court recognized that at a minimum, the employer was required to negotiate with the employee in an effort reasonably to accommodate the employee's religious beliefs. *Id.* at 75, 97 S.Ct. at 2272; *See also Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d at 401.
>
> The employer in *TWA*, for example, made several attempts to accommodate the religious practices of the plaintiff, including: (1) holding several meetings to try and solve the problem; (2) an authorized union search for someone who would exchange shifts, which was normal procedure; and (3) an effort to find another job in the company for the employee. *TWA*, 432 U.S. at 77, 97 S.Ct. at 2273.
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> In the instant case, the district court found that Hacienda did nothing to solve the problem. Appellant essentially used the seniority provision of

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alternatives would have been available to Beadle.

> the collective-bargaining agreement as a shield against its statutory obligation to reasonably accommodate its employees' religious needs. "[n]either a collective-bargaining agreement nor a seniority system may be employed to violate [Title VII]. . . ." *TWA*, 432 U.S. at 79, 97 S.Ct. at 2274.

Similarly, the Sheriff attempted to use his work rules as a shield against his Title VII obligation. Surely, neutral work rules not embraced in a collective bargaining agreement do not provide the Sheriff with a *per se* defense. The Sixth Circuit in *McGuire v. General Motors, Corp.*, 956 F.2d 607 (6th Cir. 1992), clearly rejected the idea that an employer's mere allowance of shift swap, regardless of coworkers' willingness to trade, constituted a reasonable accommodation *per se*.

Contrary to the Sheriff's assertion, *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1379 (6th Cir. 1994), concluded "[a]n employer does not fulfill its obligation to reasonably accommodate a religious belief" when it offers the employee the option of shift trading that fails to ensure the employee will not have to work her Sabbath. *Cooper* also stated that requiring the employee to use all her accrued vacation to avoid Sabbath work "does not 'reasonably accommodate' the employee's religious beliefs." *Id.*

In *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986), another case relied on by the Sheriff, the Court was asked whether a school board's collective bargaining agreement, which provided only three days of annual leave for observance of mandatory religious holidays and limited the use of personal business leave, satisfied Title VII's accommodation requirement. Philbrook had been forced to take additional leave without pay to avoid the conflict with his religious observances. The Court said "the school board policy in this

case, requiring respondent to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement, would *generally* be a reasonable one." *Id.* at 70 (emphasis supplied). This was because "[t]he provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work." *Id.*

However, *Ansonia* clearly rejected any *per se* conclusion such as advanced by the Sheriff. In interpreting the meaning of Title VII's "reasonable accommodation," this Court looked to whether the arrangement eliminated the conflict between employment requirements and religious practices.

4. Although not important to the Eleventh Circuit's decision because of its use of the wrong legal standard, the Sheriff tries to excuse his refusal to accommodate by arguing that on one occasion Beadle abandoned his post. Opp. at 6. However, the Sheriff fails to reveal that Beadle, the day before, had informed Sergeant Fitch he be unable to work when scheduled because his religious beliefs would not allow him to work past sundown that Friday. Neither Fitch nor anyone else in the Sheriff's office attempted to accommodate Beadle. PX 27, 30, 33 at 5-27; R5-86:8-98:10.

Additionally, Captain Cook testified he realized Beadle did not simply walk off his job but instead had requested to use comp time. Cook Dep. at 64:7-65:7. And Cook acknowledged there was confusion in transmitting and understanding orders. Normally, although a request for comp time leave is returned promptly if denied, when such a request is granted it is held for processing in order to ensure the comp time will be properly deducted. Because of this practice, Beadle believed

when the request was not promptly returned prior to 6:00 p.m. on Friday, the request had been granted (R6-135:8-138:2).[5]

Those times when Beadle refused to work on his Sabbath provide perfect examples of the Sheriff's week-to-week "wait and see" attitude which amounted to no accommodation at all and was the root cause of any problems the Sheriff experienced. *See EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 222 (6th Cir. 1991).[6] Beadle initially told Captain Cook his conscience would not permit him to work on his Sabbath. Cook nevertheless ordered Beadle to work as scheduled, believing that Beadle would capitulate. R6-96:17-97:11. But under Title VII Beadle could not be required to

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[5]Although Beadle refused to work on his Sabbath, any hardship experienced by the Sheriff resulted from not accommodating Beadle. When Beadle was accommodated by lower level supervisors, the accommodation never resulted in complaints by coworkers or additional cost to the Sheriff.

[6]Beadle's squad sergeant (Deitch) told Beadle, "if you can get one of the other deputies to exchange days off with you, it's all right with me." Deitch Dep. at 18:2-4. But Deitch did not consider such an arrangement to be an accommodation provided for religious purposes. *Id.* at 24:18-25:16. According to Deitch, swaps had "been a policy for the last eighteen and a half years" he had been with the Department. If a deputy was unable to get off work by using comp time, holiday, or vacation time, he could take off if he could find someone with whom to swap. *Id.* at 15:20-19:6. However, Deitch considered any personal assistance in the swapping process to be "babysitting." *Id.* at 36:8-37:13; 38:7-39:3. Colonel Parrish showed similar disdain for assisting in the swap process. When asked what hardship would result from requiring supervision to at least check whether there were other officers willing to substitute, Parrish responded "it's not management's place to coordinate that." He added "[t]hat was the responsibility of Deputy Beadle and that's the advice we had from legal counsel." R7-15:21-16:7.

"compromise" his religious beliefs. *Redmond v. GAF Corp.*, 574 F.2d 897, 902 (7th Cir. 1978); *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982).

5. The Sheriff's response ignores the Petition's second issue: if an employer has altered its neutral scheduling system to accommodate an employee's secular needs, such as schooling, may the employer withhold the same method of accommodation for an employee's religious needs? The Sheriff likewise failed to respond to Beadle's assertion that under *Ansonia*, 479 U.S. at 71, the Sheriff must provide relief from a neutral work rule (such as a rotating shift) for religious needs if it provides relief for secular reasons. The Sheriff does not deny Beadle's assertion that employees who were attending school were given special consideration and were not rotated from shift-to shift. This destroys the Department's refuge in the neutral rotating shift defense, for it cannot then claim its work rule is neutral as to religious observers.

6. The Sheriff's remaining argument is founded upon the trial court's flawed analysis, which found:

> Because of the public health, safety and welfare implications of law enforcement work, conferring upon Beadle the privilege of a permanent day off each week in this circumstance is more than a **de minimis** requirement.

App. at 23a; *see also* Opp. at 20-23.[7] The trial court

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[7]Beadle's Petition against the Tampa Police Department demonstrates that the courts below have committed manifest error in creating, by judicial fiat, an exemption for municipal law enforcement agencies from Title VII's religious accommodation requirement. (*See* pages 22-27 of Beadle's Petition for Writ of Certiorari against the Tampa, Florida, Police

marginalized the "undue hardship" standard of section 701(j) of Title VII to permit a police agency to argue, without demonstrating, that all available accommodations would result in more than a "de minimis requirement." The Sheriff cites three cases in support of that position. None of those cases, however, avoided the use of the undue hardship standard.

Factually, this case differs greatly from *United States v. City of Albuquerque*, 545 F.2d 110 (10th Cir. 1976); *Blair v. Graham Correctional Center*, 782 F. Supp. 411 (C.D. Ill. 1992); and *Ryan v. United States Dep't of Justice*, 950 F.2d 458 (7th Cir. 1991), upon which the Sheriff relies. In *City of Albuquerque*, the employee, unlike Beadle, refused to cooperate with the employer's effort to accommodate him. Nor were there alternative methods of accommodation that would have resulted in a no-cost accommodation as were present here. 545 F.2d at 113-14. In *Ryan* the employer offered to arrange for a job swap which the employee refused. 950 F.2d at 461. Here Beadle was never offered such an accommodation. And in *Blair*, unlike here, seniority provisions of a collective bargaining agreement significantly limited the available accommodation alternatives, 782 F. Supp. at 411.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition for a Writ of Certiorari, this Court should grant the Petition.

Department.) In that case the same trial court held for the police department using an identical analysis. A Petition for Writ of Certiorari in that case was docketed in this Court on April 17, 1995, as *Aston A. Beadle v. City of Tampa, Florida, et al.*, No. 94-1705. Because both this case and the *Tampa* case employ similar analyses, they should be consolidated for oral argument.

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